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No. 3

IN THE

Supreme Court of The United States

OCTOBER TERM, 1959

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased,

Petitioner,

v.

UNION CARBIDE CORPORATION and AMHERST BARGE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT—UNION CARBIDE CORPORATION

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT—UNION CARBIDE CORPORATION

JURISDICTION AND OPINION BELOW

Petitioner's brief sets forth correctly the jurisdiction of this court and that the opinion of the United States Court of Appeals for the Fourth Circuit (R241-250) is reported at 256 F. 2d 449. The unreported decision of the District Court appears in the printed record beginning at page 194.

QUESTIONS PRESENTED

1. The Court of Appeals was correct in holding that the general maritime law does not allow recovery for wrongful death.

2. The Court of Appeals was correct in holding that while "(i)n 1920 Congress adopted an act to provide a remedy for wrongful death on the high seas, 46 U. S. C. A. § 761 et seq. . . . there is no similar act where the death occurs on inland waters, unless the claim is against the employer of a deceased seaman and therefore covered by the Jones Act, 46 U. S. C. A. § 688."

3. The Court of Appeals was correct in holding that " 'where death . . . follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given.' "

4. The Court of Appeals was correct in holding that "(t)he West Virginia Wrongful Death Act, like other statutes patterned on Lord Campbell's Act, has created a new cause of action for the benefit of certain named beneficiaries, and has not perpetuated the cause of action which the deceased had before his death."

5. The Court of Appeals was correct in holding that admiralty courts in entertaining a libel in personam for damages for death from a wrongful act occurring on the inland navigable waters of the United States

must follow the substantive law of the state whose wrongful death statutes supply the cause of action.

6. When, as in this case, a libel in personam in an admiralty proceeding bases its cause of action upon the West Virginia Wrongful Death Act and alleges negligence as the cause of death and relies upon the warranty of seaworthiness, an admiralty court, in its obligation to apply the substantive law of the State of West Virginia, must follow the West Virginia law as to (A) the duty which a property owner owes to an employee of an independent contractor employed by the owner to make repairs to his property; (B) the proximate cause of death; (C) assumption of risk and/or contributory negligence; (D) limitation on damages recoverable in an action for wrongful death; (E) the manner of assessing damages under the West Virginia Wrongful death Act; and (F) whether a breach of the warranty of seaworthiness, a maritime principle, resulting in death, gives rise to a cause of action under the West Virginia Wrongful Death Act.

7. The Court of Appeals and the District Court were correct in holding that the warranty of seaworthiness did not extend to the decedent, a shorebound employee of an independent contractor engaged in sandblasting a non-self-propelled and unmanned barge which had been withdrawn from navigation and delivered into the sole custody and control of Amherst, the independent contractor, for repairs requiring drydocking.

8. Assuming that the warranty of seaworthiness extended to the decedent, the Court of Appeals was cor-

rect in holding that the barge CC-204 was not unseaworthy.

9. For any damages the petitioner may recover from Carbide in this case, Carbide is entitled to be indemnified by Amherst under the express terms of contracts between Carbide and Amherst, and by reason of Amherst's breach of its implied contractual duty to do the work contracted for in a safe and workmanlike manner.

STATUTES INVOLVED

West Virginia Constitution, Art. III, Sect. 13

"In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; * * *"

WEST VIRGINIA STATUTES

"§ 5474: (5) Action for Wrongful Death—Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his

death. Any right of action which may hereafter accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against the executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death, whether or not the death of the wrongdoer occurred before or after the death of the injured party."

"§ 5475. (6) Party Plaintiff in Such action; Damages; Distribution; Limitation.—Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate, left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars; Provided, however, if the plaintiff in such action shall prove by a preponderance of the evidence financial or pecuniary loss sustained by a distributee or distributees of such deceased person in an amount exceeding the sum of ten thousand dollars the jury may give such damages as shall equal such financial or pecuniary loss, not exceeding twenty thousand dollars as the total of all damages recoverable in such action, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. Every such action shall be commenced within two years after the death of such deceased person."

COAST GUARD STATUTES AND REGULATIONS

14 U. S. C. A., § 633.

"In addition to the authority conferred by other provisions of this title the Secretary may promulgate

such regulations and orders as he deems appropriate to carry out the provisions of this title or any other law applicable to the Coast Guard. Aug. 4, 1949, c. 393, § 1, 63 Stat. 545."

The following sections from "Rules and Regulations, United States Coast Guard," February 1, 1954, and Revisions to October 1, 1956, (Title 46 C. F. R., 30 to 39 inclusive).

"31.15-5—Tank barges—B/ALL. Tank barges need not be manned unless in the judgment of the Officer in Charge, Marine Inspection, such manning is necessary for the protection of life and property and for the safe operation of the vessel."

"32.01-10 Rails —TB/ALL. (a) All tank vessels, except unmanned tank barges, the construction or conversion of which is started on or after July 1, 1951, shall be fitted with fixed or portable rails on decks and bridges."

"33.40-5 (now 33.40-10) Number required on tank barges — B/ALL. All tank barges regardless of size shall have at least two life buoys on board: Provided, however, That unmanned barges are exempt from this section."

"34.40-5 Hand fire extinguishers for quarters, pump room, and machinery spaces — B ALL. (d) Each unmanned tank barge not provided with a cargo pump room shall be equipped with at least one 2½ gallon foam type fire extinguisher or the equivalent, which may be carried aboard the barge or the towing vessel, while under way. When the barge is moored to the dock, such equipment shall be accessible, or equivalent equipment may be supplied by the terminal."

STATEMENT

This appellant accepts the statement of the case quoted from the opinion of the Court below but not the insertions or bracketed matter. In addition to the portions of the opinion of the Court below quoted by appellant we deem the following pertinent:

"It is not necessary for us to decide whether a suit in admiralty under the West Virginia Act can ever be based upon unseaworthiness, because Goett was not a person to whom the warranty of seaworthiness ran, and because we do not agree with the finding of the district judge that the barge was unseaworthy." (RP-247)

"The work order called for drydocking of the vessel; without such drydocking the bottom and sides of the barge would have been inaccessible. The warranty of seaworthiness does not apply in that situation.

"The barge was not unseaworthy. In its ordinary operations, it was unmanned, and did not require life saving equipment. It did not become unseaworthy when men went aboard after it had been turned over to a repair yard under the circumstances of this case. *Lester* v. *United States*, 2 Cir., 234 F. 2d 625, cert. den. 352 U. S. 889.

"B. Nor was Carbide negligent in delivering the barge to Amherst without mounting life rings or other safety equipment on the barge, or in failing to rescue Goett after he fell into the river, as contended by his administratrix. There is of course, a duty on a vessel and her owners to have life saving equipment available to rescue members of her crew who fall overboard while the vessel is in operation. *Sadler* v. *Pennsylvania*, 4 Cir., 159 F. 2d 784, and cases cited. A similar duty

is owed to business visitors who come aboard while the vessel is in the custody and control of her officers or other representative of the owners. But in the instant case Carbide had delivered the barge into the sole custody and control of Amherst. Carbide's duty under those circumstances was to warn Amherst and its employees of any hidden danger or latent defect. There was no hidden danger (fol. 613) or latent defect in the barge. It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It knew and controlled the conditions of the work and the equipment which would be used. It was Amherst's responsibility to decide whether a temporary railing or stanchions should be errected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted." (RP-249-250)

SUMMARY OF ARGUMENT

This is a law action transferred to admiralty by administratrix of shore bound employee of contractor against barge owner for alleged wrongful death. Such employee met his death by drowning in the Kanawha River, having fallen or jumped from flat deck of unmanned tank barge moored along contractor's dry-dock, the barge being in the sole custody and control of contractor.

The general maritime law does not allow recovery for wrongful death and petitioner's claim is predicated on the wrongful death statute of West Virginia. This is a new cause of action. Points I, II, III and IV. The Court of Appeals was correct in holding that admiralty courts, in entertaining such an action, must follow the substantive law of the state supplying such cause and "must enforce the right as an integrated whole, with

whatever conditions and limitations the creating State has attached." Point V.

The conditions and limitations of the West Virginia statute include (a) definition of the duty which a property owner owes to the employee of an independent contractor making repairs (there was no breach of duty and no negligence shown); (b) definition of proximate cause of death; (c) defenses of assumption of risk and/or contributory negligence; (d) a limitation on the amount of damages recoverable in such action; (e) the manner of assessing damages under the statute on which the cause or action is predicated; (f) whether a breach of the warranty of seaworthiness gives rise to the cause under the state statute. Point VI.

Both courts below were correct in holding that the warranty of seaworthiness does not extend to a shore bound employee of an independent drydocking contractor engaged in making repairs to an unmanned barge, withdrawn from navigation and in the sole custody and control of contractor. Point VII. But the barge was not unseaworthy and the Court of Appeals was correct in so finding. Point VIII.

Carbide, the owner, is entitled to indemnification from Amherst, the independent contractor, if any recovery is allowed against owner. Point IX.

ARGUMENT

I.

The Court of Appeals was correct in holding that the general maritime law does not allow recovery for wrongful death.[1]

On no less than three occasions within the past two years, this Court has held expressly or in effect that

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[1] *General Maritime Law*—The Harrisburg, 119 U. S. 199, 7 S. Ct. 140, 30 L. Ed. 358 (1886); Metcalf v. The Alaska, 130 U. S. 201, 9 S. Ct. 473, 32 L. Ed. 923 (1889); Butler v. Boston & Savannah Steamship Co., 130 U. S. 527, 9 S. Ct. 612, 32 L. Ed. 1017 (1889); Barton v. Brown, 145 U. S. 335, 12 S. Ct. 949, 36 L. Ed. 727 (1892); The Albert Dumois, 177 U. S. 240, 20 S. Ct. 595, 44 L. Ed. 751 (1900); Deslions v. La Compagnie Generale Transatlantique, 210 U. S. 95, 28 St. Ct. 664, 52 L. Ed. 973 (1908); Western Fuel v. Garcia, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210 (1921); Panama R. Co. v. Rock, 266 U. S. 209, 45 S. Ct. 58, 69 L. Ed. 250 (1924) (dictum); Lindgren v. United States, 281 U. S. 38, 50 S. Ct. 207, 74 L. Ed. 686 (1930); Just v. Chambers, 312 U. S. 383, 61 S. Ct. 687, 85 L. Ed. 903 (1941) (dictum); Levinson v. Deupree, 345 U. S. 648; 73 S. Ct. 914, 97 L. Ed. 1319 (1953); Kernan v. American Dredging Co., 355 U. S. 426, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958); Romero v. International Term. Operat. Co., 358 U. S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368, 383 (1959) (dictum); The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959); United N. Y. & N. J. S. H. Pilots Asso. v. Halecki, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959); O'Leary v. United States Lines Co., 215 F. 2d 708 (1st Cir. 1954), cert. den., 348 U. S. 939, 75 S. Ct. 360; 99 L. Ed. 735 (1955); Turner v. Wilson Line of Mass., 242 F. 2d 414 (1st Cir. 1957); Halecki v. United New York & New Jersey S. H. P. Ass'n., 251 F. 2d 708 (2d Cir. 1958), case remanded on another point in 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959); Curtis v. A. Garcia Y Cia, 241 F. 2d 30 (3d Cir. 1957); Skovgaard v. The M/V Tungus, 252 F. 2d 14 (3d Cir. 1957), affirmed, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 527 (1959); Pope v. McCrady Rodgers Co., 164 F. 2d 591 (3d Cir. 1947); Holley v. The Manfred Stansfield, 269 F. 2d 317 (4th Cir. 1959); Mejia v. U. S., 152 F. 2d 686 (5th Cir. 1946), cert. den., 328 U. S. 862, 66 S. Ct. 1366, 90 L. Ed. 1632 (1946); Niepert v. Cleveland Electric Illuminating Co., 241 F. 2d 916 (6th Cir. 1957), cert. den., 354 U. S. 909, 77 S. Ct. 1295, 1 L. Ed. 2d 1427 (1957); Loc-Wood Boat & Motors v. Rockwell, 245 F. 2d 306 (8th Cir. 1957).

it is an established principle of maritime law that in the absence of a statute there is no action for wrongful death. *Skovgaard*, *Halecki*, and *Kernan*, footnote 1. First established over sixty years ago in the carefully considered case of *The Harrisburg*, this principle has over the years been considered and recognized in case after case handed down by this Court, prompting Mr. Justice Brennan in his dissent to *Skovgaard* to observe that it "has become part and parcel of our maritime jurisdiction." Also, within recent times, indeed within a little over the past decade, at least seven of the federal judicial circuits have rendered decisions based upon this principle, reference being made to the repeated holdings of the Supreme Court; see the cases in footnote 1.

Thus, we do not have here a principle which was established long ago and not re-evaluated in modern times, but rather a principle where the opportunity for review has been frequent, especially in recent years. This constant reappraisal by this Court and the federal Courts of Appeal demonstrates the consideration given the matter and the deep roots the principle has in maritime law.

Petitioner in her brief apparently takes the position that the general maritime law provided an action for wrongful death in the absence of statute and that *The Harrisburg* in holding the contrary is in error. While no authority is cited in support of this proposition, petitioner hints that some ancient continental maritime law permitted such a cause of action which became fused into the Roman Codes. "Concededly," the petitioner asserts the civil law provided a remedy

in an action for wrongful death. Petitioner's Brief at p. 19. Apparently the French courts have recognized in maritime cases a cause of action for wrongful death, but as noted in *Deslions* v. *La Compagnie Generale Transatlantique*, 210, U. S. 95, 28 S. Ct. 664, 52 L. Ed. 973, 993 (1908), such right of action has been recognized and enforced only from the date of the enactment of the Code Napoleon. Even the article of the Napoleonic Code therein relied upon was not recognized as conferring a right of action for wrongful death under the law of Spain, a more express statute being necessary.

But even assuming that there existed some ancient continental maritime law granting a cause of action in such cases, the United States is not compelled to follow it, nor can an inconvenient controlling precedent be brushed off merely by an historical demonstration (which has not been made here) that the precedent was based upon a misunderstanding of earlier decisions. *Mitchell* v. *Trawler Racer, Inc.*, 265 F. 2d 426, 432 (1st Cir. 1959).

In *The Lottawanna*, 21 Wall. 558, 572, 22 L. Ed. 654, 661, Mr. Justice Bradley, speaking for the Court, said:

"(I)t is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country . . ."

And in *United States* v. *Thompson (The Western Maid)*, 257 U. S. 419, 432, 42 S. Ct. 159, 66 L. Ed. 299, 302, Mr. Justice Holmes, speaking for the Court, said:

> "(W)e must realize that, however ancient may be the traditions of maritime law, however di-

> verse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over law to which even the United States must bow."

There is also the famous dissent of Mr. Justice Holmes in *Southern P. Co.* v. *Jensen*, 244 U. S. 205, 61 L. Ed. 1086, 1100 (1917), in which he recognized that there is no superior source of maritime law from that declared by the United States and that "(t)he maritime law is not a corpus juris—it is a very limited body of customs and ordinances of the sea."

Thus, the precedent set in *The Harrisburg* is doubly guarded, in that while the petitioner goes to great length to discuss a conflict between the common law and admiralty courts in England centuries ago, she has failed to historically demonstrate that this decision was based upon any misunderstanding of earlier law, and even assuming that it was, the United States was not then and is not now bound by any contrary ancient continental maritime decisions, if there be such.

II.

The Court of Appeals was correct in holding that while "(i)n 1920 Congress adopted an act to provide a remedy for wrongful death on the high seas, 46 U. S. C. A. § 761 et seq. . . . there is no similar act where the death occurs on inland waters, unless the claim is against the employer of a deceased seaman and therefore covered by the Jones Act, 46 U. S. C. A. § 688."[2]

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[2]The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959); Levinson v. Deupree, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953).

Goett was not a seaman, respondent Carbide was not his employer, and his death occured upon the territorial waters of West Virginia; therefore, neither the Death on the High Seas Act nor the Jones Act is applicable.

III.

The Court of Appeals was correct in holding that " 'where death . . . follows from a maritime tort committed on navigable waters within a state whose statutes gives a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given.' "[3]

IV.

The Court of Appeals was correct in holding that "(t)he West Virginia Wrongful Death Act,[4] like other statutes patterned on Lord Campbell's Act, has created a new cause of action for the benefit of certain named beneficiaries, and has not perpetuated the cause of action which the deceased had before his death."[5]

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[3]The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959); Levinson v. Deupree, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953); Western Fuel v. Garcia, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210 (1921).

[4]Chapter 55, Article 7, Section 5 et seq., of the Official Code of West Virginia, 1931, as amended.

[5]A. *English Courts*—Pym v. Great Northern Ry., 4 B&S 396, 122 Eng. Rep. 508 (Exch. 1863); see 31 Tulane L. Rev. 353 (1957).

B. *Federal Courts*—Gulf, C&S, F. T. Co. v McGinnis, 228 U. S. 173, 33 S. Ct. 426, 57 L. Ed. 785 (1913); American R. Co. v. Didricksen, 227 U. S. 145, 33 S. Ct. 224, 57 L. Ed. 456 (1913); Thames v. State of Mississippi, 117 F. 2d 949 (5th Cir. 1941); Curtis v. A. Garcia Y Cia, 241 F. 2d 30 (3d Cir. 1957); 16 Am. Jur., Death, § 61, p. 48; Crab Orchard Improvement Co. v. Chesa-

V.

The Court of Appeals was correct in holding that admiralty courts in entertaining a libel in personam for damages for death from a wrongful act occurring on the inland navigable waters of the United States must follow the substantive law of the state whose wrongful death statutes supply the cause of action.[6]

The Court in the *Skovgaard* case, decided earlier this year, said in considering this problem,

> "The decisions of this court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the

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peake & Ohio Ry. Co., 33 F. Supp. 580 (S. D. W. Va., 1940); affirmed, 115 F. 2d 277 (4th Cir. 1940).

C. *West Virginia Supreme Court of Appeals*—Burgess v. Gilchrist, 123 W. Va. 727, 17 S. E. 2d 804 (1941); Dunsmore v. Hartman, 140 W. Va. 357, 84 S. E. 2d 137 (1954).

D. *State Courts generally*—See cases listed in 16 Am. Jur., Death, § 61, p. 48.

[6]The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959); Levinson v. Deupree, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953); Western Fuel v. Garcia, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210 (1921); Garrett v. Moore-McCormack Co., Inc., 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942); See also the Courts of Appeal cases at footnote 8 in The Tungus v. Skovgaard, *supra*, to which may be added Niepert v. Cleveland Electric Illuminating Co., 241 F. 2d 916 (6th Cir. 1957), cert. den., 354 U. S. 909, 77 S. Ct. 1295, 1 L. Ed. 2d 1427 (1957); Hartford Accident & Indemnity Co. v. Gulf Refining Co., 230 F. 2d 346 (5th Cir. 1956), cert. den., 352 U. S. 832, 77 S. Ct. 49, 1 L. Ed. 2d 52 (1956); Continental Casualty Co. v. Thorden Line, 186 F. 2d 992 (4th Cir. 1951); Puleo v. H. E. Moss & Co., 159 F. 2d 842 (2d Cir. 1947), cert. den., 331 U. S. 847, 67 S. Ct. 1733, 91 L. Ed. 1857 (1947); Byrd v. Napoleon Avenue Ferry Co., 125 F. Supp. 573 (E. D. La., 1954), affirmed in a memorandum decision, 227 F. 2d 958 (5th Cir. 1955), cert. den., 351 U. S. 925, 76 S. Ct. 783, 100 L. Ed. 1455 (1956). See also Student Comments 68 Harv. L. Rev. 1266 (1955), and 41 Va. L. Rev. 251 (1955), and Student Note 31 Tulane L. Rev. 353 (1957).

right as an integrated whole, with whatever conditions and limitations the creating State has attached. That is what was decided in The Harrisburg, where the Court's language was unmistakable.

". . . (I)f the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence . . . The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.' 119 U.S. 199, at 214. That is the doctrine which has been reiterated by the Court through the years. See the Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 US 398, 52 L. ed. 264, 28 S. Ct. 133; The La Bourgogne (Deslious v. La Compagnie Generale Transatlantique) 210 US 95, 52 L ed 973, 28 S Ct 664; Western Fuel Co. v. Garcia, 257 US 233, 66 L ed 210, 42 S Ct. 89; Levinson v. Deupree, 345 US 648, 97 L ed 1319, 73 S Ct 914; cf Just v. Chambers, 312 US 383, 85 L ed 903, 61 S Ct. 687.

"'Admiralty courts when invoked to protect rights rooted in state law endeavor to determine the issues in accordance with the substantive law of the state.' Garrett v. Moore-McCormack Co. 317 US 239, 245, 87 L ed 239, 243, 63 S Ct. 246. The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose."

* * * * *

"There is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law. Even Southern P. Co. v. Jensen, which fathered the uniformity concept, recognized that uniformity is not offended by the right given to recover in death cases. 244 US 205, at 216. It would be an anomaly to hold that a State may create a right of action for death, but that it may not determine the circumstances under which that right exists. The power of a State to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not. Cf. Caldarola v. Eckert, 332 US 155, 91 L ed 1968, 67 S Ct 1569.

"We hold, therefore, that the Court of Appeals was correct in viewing the basic question before it as one of interpretation of the law of New Jersey. It is within that frame of reference that we consider the issues presented."

VI.

When, as in this case, a libel in personam in an admiralty proceeding bases its cause of action upon the West Virginia Wrongful Death Act and alleges negligence as the cause of death and relies upon the warranty of seaworthiness, an admiralty court, in its obligation to apply the substantive law of the State of West Virginia, must follow the West Virginia law as to (A) the duty which a property owner owes to an employee of an independent contractor employed by the owner to make repairs to his property;[7] (B) the

[7]The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959). See Mr. Justice Brennen dissent to Skovgaard at page 539 of Lawyers' Edition wherein he states, "Although it

proximate cause of death;[8] (C) assumption of risk and/or contributory negligence;[9] (D) limitation on damages recoverable in an action for wrongful death;[10]

(opinion of the Court) believes that the Court of Appeals properly applied New Jersey law, the Court accepts the contention (made by the petitioner) that state law applied here." Puleo v. H. E. Moss & Co., 159 F. 2d 842 (2d Cir. 1947), cert. den., 331 U. S. 847, 67 S. Ct. 1733, 91 L. Ed. 1857 (1947); The H. S. Inc., No. 72, 130 F. 2d 341 (3d Cir. 1942); Lundberg v. Prudential Steamship Corp., 102 F. Supp. 115, 118 (1951). The derivation of the duty pronounced in United N. Y. & N. J. S. H. Pilots Asso. v. Halecki, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541, 545 (1959) is not revealed, although the Court of Appeals cited the Restatement of Torts, Vol. II, § 344, Comment B; footnote 3 in Halecki, 251 F. 2d 708, 711. The duty announced in Kermarec v. Transatlantique, 358 U. S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550, 555 (1959), is to be distinguished in that the case involved personal injuries and the court applied maritime law principles; see also Young v. Masci, 289 U. S. 253, 53 S. Ct. 599, 77 L. Ed. 1158 (1933); Gulf, Mobile & Ohio R. Co. v. Freund, 183 F. 2d 1005 (8th Cir. 1950), cert. den., 340 U. S. 904, 71 S. Ct. 280, 95 L. Ed. 654; Hartford Accident & Indem. Co. v. Eastern Air Lines, 155 F. Supp. 263 (S. D. N. Y., 1957); Clise v. Prunty, 108 W. Va. 635, 152 S. E. 201 (1930); 13 A. L. R. 2d 650, 11 Am. Jur., Conflict of Laws, § 182, p. 490.

[8]Whether a breach of a duty was the proximate cause of death is to be determined by the substantive law of the State and its definition of proximate cause. This follows from the principle stated in Point Five.

[9]Curtis v. A. Garcia Y Cia, 241 F. 2d 30 (3d Cir. 1957); Niepert v. Cleveland Electric Illuminating Co., 241 F. 2d 916 (6th Cir. 1957), cert. den., 354 U. S. 909, 77 S. Ct. 1295, 1 L. Ed. 2d 1427 (1957); Hartford Accident & Indemnity Co. v. Gulf Refining Co., 230 F. 2d 346 (5th Cir. 1956), cert. den., 352 U. S. 832, 77 S. Ct. 49, 1 L. Ed. 2d 52 (1956); Graham v. A. Lusi, Limited, 206 F. 2d 223 (5th Cir. 1953); Klingseisen v. Costanzo Transp. Co., 101 F. 2d 902 (3d Cir. 1939); Feige v. Hurley, 89 F. 2d 575 (6th Cir. 1937); Byrd v. Napoleon Avenue Ferry Co., 125 F. Supp. 573 (E. D. La., 1954), affirmed in a memorandum decision, 227 F. 2d 958 (5th Cir. 1955), cert. den., 351 U. S. 925, 76 S. Ct. 783, 100 L. Ed. 1455 (1956).

[10]The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524, 528 (1959), wherein it was said, "The decisions of this court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the

(E) the manner of assessing damages under the West Virginia Wrongful Death Act;[11] and (F) whether a breach of the warranty of seaworthiness, a maritime principle, resulting in death, gives rise to a cause of action under the West Virginia Wrongful Death Act.[12]

A: The Court of Appeals was correct in holding that there was no affirmative duty on the part of Carbide to change the conditions of its unmanned barge, the CC-204, by mounting life rings or other safety equipment thereon, to make ready for the work of the decedent and other employees of Amherst Barge Company, and was correct in holding that since Carbide had delivered the barge into the sole custody and control of Amherst, Carbide's sole duty, with respect to the negligence count, was to warn Amherst and its employees of any

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creating State has attached." The West Virginia Wrongful Death Act expressly limits the damages recoverable in such action: ". . . the jury may give such damages . . . not exceeding twenty thousand dollars as the total of all damages recoverable in such action . . .". Code Serial Section 5475 (6); see also Hupp Motor Car Corp. v. Wadsworth, 113 F. 2d 827 (6th Cir. 1940); Barnes v. Union Pacific Railroad Co., 139 F. Supp. 198 (D. Idaho, 1956); 11 Am. Jur., Conflict of Laws, § 185.

[11]Reference is made to The Tungus v. Skovgaard, *supra*, footnote 10, and in particular to its direction that admiralty must enforce a state's wrongful death act "with whatever conditions and limitations the creating State has attached." The West Virginia Wrongful Death Act expressly provides that "the jury may give such damages" as authorized. Code Serial Section 5475 (6). In Legg v. Jones, 126 W. Va. 757, 30 S. E. 2d 76 (1944), the court said, "In actions (for wrongful death), it is the peculiar right, as well as the duty, of the jury to fix the amount of the recovery. The right is conferred and the duty imposed by the statute which gives the right of action . . . The authority of the jury to determine the amount of recovery in such cases is absolute . . ."

[12]The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959); Levinson v. Deupree, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953).

hidden danger or latent defect, of which there was none.[13]

The Court of Appeals in its statement of the facts well describes the CC-204, the tank barge owned by Carbide, and the repairs which Amherst was required to make by its contract with Carbide; accordingly, since this statement is for the most part accepted by petitioner (Brief, pp. 4 and 5), it will be quoted at some length:

> "Carbide was the owner of the CC-204, an unmanned steel tank barge, with a flat deck. Except for pipe lines, it had no superstructure of any kind, but there were keyels along the outer edges of the deck to assist in mooring. It had no railing around its deck and was not equipped with any life rings or similar rescue equipment. Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys, and it is not customary for such barges to be so equipped. The barge and its equipment had been inspected, certified and approved by the Coast Guard; the certificate of inspection issued on April 1, 1955, granted permission for navigation as an unmanned tank barge on rivers and inland waters tributary to the Gulf of Mexico, approved for use without equipment other than fire extinguishers.
>
> "Amherst owns and operates a repair dock, with marine ways on the Kanawha River, at Reed, West Virginia. In October, 1955, Carbide contracted with Amherst for a biennial drydocking, certain welding repairs and improvements to the barge, including installation of twenty-

[13] Sesler v. Coal Co., 51 W. Va. 318, 41 S. E. 216 (1902); Trimyer v. Norfolk Tallow Co., 192 Va. 776, 66 S. E. 2d 441 (1951); 38 Am. Jur., Negligence, § 97, p. 757. Roberts v. Axe & Tool Co., 107 W. Va. 236, 148 S. E. 70 (1929), distinguished.

four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides with perparation for the painting by means of sandblasting. The work was to be done in accordance with Carbide's written specification. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications.

"In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 2. Carbide's supervisor of barge maintenance went on board the barge on the following day with Amherst's maintenance superintendent, to point out and discuss the work that was to be done.

"No officer, crewman, watchman or other person employed by Carbide was left on or with the barge after it was delivered to Amherst; it was in the exclusive care, custody and control of Amherst on October 5, when Goett was drowned. The barge was then afloat on the Kanawha River, lying along shore, near Amherst's marine ways; it was moored to and against the head of a digger boat, which lay downstream from the barge. The digger boat was attached to the shore by a semi-permanent ramp, which was the means of access to the barge from the shore. A ring-type life buoy with a line attached was mounted on the digger boat."

It is to be emphasized that the CC-204 was an unmanned barge; that applicable Coast Guard Regulations (14 U. S. C. A. § 88; R. 242) did not require the CC-204 to be equiped with railings or life buoys; and that a certificate of inspection issued by the Coast

Guard on April 1, 1955, granted permission for navigation of the CC-204 as an unmanned tank barge on rivers and inland waters tributary to the Gulf of Mexico without equipment other than fire extinguishers. (R. 217, 242) The attempt by unidentified pictures in a book by an unidentified author to show that inland tank barges carried life saving equipment not only failed (R 188) but if admissible actually showed the contrary and petitioners alleged expert finally admitted (R 124) that it is not customary to so equip such barges.

Yet, in face of this, the District Court concluded that Carbide was duty bound to install or erect life lines, stanchions, and other rescue equipment on the barge before placing it in the exclusive care, custody and control of Amherst, a competent and experienced marine repair contractor. Place this duty in another context. If a homeowner calls in a roofing contractor to repair his roof, he has the duty, according to the conclusions of the District Court, to furnish the contractor's employees with safety devices such as safety ladders, ropes, scaffolding, etc., to protect the employees of the contractor against the very dangers that arise from their work. Negligence is a conclusion of law which Courts of Appeal will review. *Verbeck* v. *Black Diamond Steamship Corp.*, 269 F. 2d 68.

The Court of Appeals accordingly held that the District Judge had imposed too strict a duty upon Carbide and concluded that *under the circumstances of the case* there was no duty on the part of Carbide to change the conditions of its unmanned barge, the CC-204, by mounting life rings or other safety equipment thereon (Equipment not required or used in navigation), to make ready for the work of the decedent and other em-

ployees of Amherst. "(I)n the instant case Carbide had delivered the barge into the sole custody and control of Amherst. Carbide's duty under those circumstances was to warn Amherst and its employees of any hidden danger or latent defect. It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It was Amherst's responsibility to decide whether a temporary railing or stanchions should be erected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted." (R. 249, 250; 256 F. 2d 449, 455)

As demonstrated *supra* in main Point VI, it is the West Virginia law which must be followed in measuring the duty which a property owner owes to an employee of an independent contractor employed by the owner to make repairs to his property. In *Sesler* v. *Coal Co.*, 51 W. Va. 318, 41 S. E. 216 (1902), an independent contractor in the second count of his declaration against his employer averred," 'It became and was the duty of the defendant to furnish for the plaintiff while he was so in its employ, a good, proper, safe and suitable place for him to work, so that he might be secure and safe in all respects from injury against which ordinary care and foresight could avail.' " On demurrer, the Court was faced with the question of "(w)hat duty by law is due from an employer (sic) to one who is an independent contractor to do a specific work?" The Court decided the issue by quoting from a note in 26 L. R. A. 524, which it believed correctly stated the law, as follows:

> " 'With few exceptions, the cases agree in holding that the premises upon which an independ-

ant contractor is required to labor for the benefit of the owner must be reasonably safe for the purposes of such labor, so far as freedom from concealed danger is concerned.' We may thus say, that if the decision of this case does in fact rest on any duty arising merely from the relation of the parties because of the contract between them, the unsafety of the premises must be such as was known, or by fair care could have been known to the defendant, and was unknown, and by fair care could not have been known to the contractor; for it is very clear that if the plaintiff knew, or by fair care could have known of the work which injured him, he cannot recover. Whart. on Negligence, s. 833. It is well established that if one knows, or by fair care could know of danger threatening him, he cannot encounter that danger, and charge his injury upon the owner of the primises even though that owner be in fault. Such would be even the law between master and servant."

There is the later case of *Roberts* v. *Axe and Tool Co.*, 107 W. Va. 236, 148 S. E. 70 (1929), wherein the Court stated:

"(a)n independent contractor at work on premises where his contract requires him to be is an invitee, and that while thus engaged he is entitled to the protection of ordinary care on the part of the owner or occupier of the premises, and . . . such invitee must be furnished a reasonably safe place in which to work."

The *circumstances of the case* in which this principle was announced must be understood, for the statement as applied to the facts of that case in no way imposes an affirmative duty upon the property owner of the nature described by the District Judge in the instant case. In

the *Roberts* case, the premise owner not only remained in control of its property on which the employee of the independent contractor was working, but continued actively engaged in manufacturing and owner's operations caused the injury. Under these circumstances, said the Court, the owner and his employees were required to exercise reasonable precaution for the safety of the erecting contractor's workmen.

In *Trimyer* v. *Norfolk Tallow Co.*, 192 Va. 776, 66 S. E. 2d 441 (1951), the Court had to decide upon the duty which a premise owner had to an employee of an independent contractor engaged to make repairs to his property, and held as follows:

> "The owner must give notice or warning to an invitee of an unsafe condition which is known to him and is unknown to the invitee; but notice or warning is not required where the dangerous condition is open and obvious to a person who is exercising reasonable care for his own safety. In the absence of knowledge or warning of danger, such an invitee is entitled to assume that the premises are reasonably safe for his visit.
>
> "The duty to warn, however, exists only with respect to latent dangers not to those which are or ought to be obvious to the invitee. To sustain a charge of negligence the unsafe condition relied on must be one of which the owner knew or should have known, and the invitee did not know and could not reasonably have discovered."

The Tungus v. *Skovgaard*, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959), is to be distinguished first because the Court applied New Jersey law as to duty (see Mr. Justice Brennan's dissent at pages 538 and 539 of 3 L. Ed. 2d), and second because the Court found that

"the officers and crew of the *Tungus* remained in overall control of the vessel, and that they were aware of the existence of the oil spill and of the danger created by it for approximately an hour before Skovgaard arrived on board. Under these facts," said the Court, "it was concluded that the law imposed upon the petitioner the duty of exercising ordinary care to provide Skovgaard with a reasonably safe place to carry on his work of repairing the pump," and this Court found no reason to question the disposition of this branch of the case.

United N. Y. & N. J. S. H. Pilots Asso. v. *Halecki*, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959), is to be distinguished first because the case did not arise under the West Virginia Wrongful Death Act, and second because the vessel owner had knowledge that the use of an inherently dangerous substance was to be employed in the narrow confines of the engine room.

In conclusion, it is submitted that the Court of Appeals was correct in holding that under the *circumstances of this case* Carbide's duty was "to warn Amherst and its employees of any hidden danger or latent defect. There was no hidden danger or latent defect in the barge," and hence no negligence.

We also submit that under any rule of duty that Carbide did furnish decedent a safe place to work and that there is no evidence to the contrary.

B. Even assuming (which is denied) that there was an affirmative duty on the part of Carbide to change the conditions of its unmanned barge, the CC-204, by mounting life rings or other safety equipment thereon, to make ready for the work of the decedent and other

employees of Amherst, any breach of this duty was not, under West Virginia law which here governs, the proximate cause of the death here complained of.[14]

If, indeed, Carbide was negligent in turning its barge over to Amherst without safety and rescue equipment, Amherst certainly knew that fact (R. 77, 138), and by failing to furnish its employee with this equipment was itself negligent in not providing its employees with a reasonably safe place in which to work (R. 249, 250). As was said in *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181, 182 (9th Cir. 1950),

> "With this knowledge (Amherst) should not have permitted (Goett) to work in this dangerous circumstance as to which it was fully informed, * * * 'Where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act of negligence, which supervenes in time, and which has as its

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[14]Washington v. B & O Railroad Company, 17 W. Va. 190, 196 (1880); Accord, Tompkins v. Kanawha Board, 21 W. Va. 224, 231 (1882); Fawcett v. Railway Co., 24 W. Va. 755, 759 (1884); State v. Baller, 26 W. Va. 90, 105 (1885); Berns v. Coal Co., 27 W. Va. 285, 304 (1885); Douney v. Railway Co., 28 W. Va. 732, 737 (1886); Pegram v. Stortz, 31 W. Va. 220, 234, 6 S. E. 485 (1888); Phillips v. County Court, 31 W. Va. 477, 481, 7 S. E. 427 (1888); Harrow v. Ohio River R. Co., 38 W. Va. 711, 715, 18 S. E. 926 (1894); Poling v. Ohio R. R. Co., 38 W. Va. 645, 669, 18 S. E. 782 (1893); Carrico v. W. Va. C & P Ry. Co., 39 W. Va. 86, 98, 19 S. E. 571 (1894); Anderson v. Railroad Co., 74 W. Va. 17, 22, 81 S. E. 579 (1914); Keirn v. McLaughlin, 121 W. Va. 30, 33, 1 S. E. 2d 176 (1939); McKinney v. Miller, 138 W. Va. 324, 75 S. E. 2d 854 (1953); Matthews v. Cumberland & Allegheny Gas Co., 138 W. Va. 639, 77 S. E. 2d 180, 189 (1953); Hartley v. Crede, 140 W. Va. 133, 82 S. E. 2d 672 (1954). See also American President Lines v. Marine Terminals Corp., 234 F. 2d 753, 759 (9th Cir. 1956), cert. den., 352 U. S. 926, 77 S. Ct. 222, 1 L. Ed. 2d 161 (1956); United States v. Rothschild International Steve. Co. 183 F. 2d 181 (9th Cir. 1950).

basis a condition which has resulted from this first act of negligence, in that case they do not share; but in that case we say that the consequences of the first act of negligence did not include the consequences of the second."

The same principle was similarly stated in the recent West Virginia case of *Hartley* v. *Crede*, 140 W. Va. 133, 82 S. E. 2d 672 (1954), wherein the Court said;

> "The proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not have occurred* * * The proximate cause of an event is that cause which in actual sequence, unbroken by any independent cause, produces an event and without which the event would not have occurred.
>
> "An intervening cause of an injury is a negligent act or omission which constitutes a new effective cause and which, operating independently of anything else, is the proximate cause of the injury."

As earlier pointed out, it is the West Virginia law on proximate cause which governs. In the much older case of *Washington* v. *B & O Railroad Company*, 17 W. Va. 190, 196 (1880), the Court in discussing proximate cause said:

> "The act or omission which constitutes negligence, must be such as directly produces as its natural consequence an injury to another. And therefore if a party do an act, which might naturally produce an injury to another as its consequence, but before any such injury results, a third person does some act or omits to perform some act, which it was his duty to perform, and this act or omission of such third person is the immediate cause of an injury, which would not

> have occurred but for his negligence, such third person is responsible for such injury and not the party guilty of the first negligence; for the causal connection between the first act of negligence and the injury is broken by the interposition of the act or omission of the third party. And this act or omission of the third party is in law regarded as the cause of the injury, and the act of the first party is in law regarded as a mere condition, according to the maxim: 'In jure non remota causa sed proxima spectatur.'"

The act, then, of Carbide in turning its barge over to Amherst in its normal condition without safety and rescue equipment was not the proximate cause of decedent's death, but, rather, the proximate cause was the negligent omission on the part of Amherst to provide its own employees with a reasonably safe place in which to work. Thus, the District Court was clearly in error in finding Carbide negligent, for its omission, if any, was not the proximate cause of the decedent's death.

C. Assuming that there was an affirmative duty on the part of Carbide towards the decedent as described in the foregoing Point VI-B, there could not be a recovery in this case for any breach of the same, in that under West Virginia law, which here governs, assumption of risk and/or contributory negligence, however slight, on the part of the decedent bars recovery under the West Virginia Wrongful Death Act,[15] and the evidence in this case demonstrates as a matter of law that the decedent both assumed the risk and was contributorily

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[15]Woodell v. West Virginia Improvement Co., 38 W. Va. 23, 17 S. E. 386, 392 (1893); Barr v. Curry, 137 W. Va. 364, 71 S. E. 2d 313 (1952); Wolfe v. Beatty Motor Express, W. Va. , 101 S. E. 2d 81, 84 (1957); and numerous West Virginia cases cited in 13 M. J., Negligence § 26, p. 539.

negligent and accordingly the District Judge's negative findings in these respects were clearly erroneous.

As has previously been pointed out in main Point VI of this brief, it is the West Virginia law on contributory negligence and assumption of risk which governs in this case.

In a recent opinion of the West Virginia Supreme Court of Appeals, that Court again stated that West Virginia does not recognize the rule of comparative negligence. Thus, in *Wolfe* v. *Beatty Motor Express*, ... W. Va. ..., 101 S. E. 2d 81, 84 (1957), the Court said:

> "This court has not recognized the rule of comparative negligence. Therefore, we are not at liberty to determine whether the negligence of the defendants was greater or less than that of the plaintiff, if the latter was negligent. The plaintiff cannot prevail if he was negligent, and his contributory negligence contributed proximately to his injury, in whatever degree he may have been negligent."

And in *Barr* v. *Curry*, 137 W. Va. 364, 372, 71 S. E. 2d 313 (1952), it was said:

> "A person whose negligence proximately contributes to his injury cannot recover and if death ensues, a recovery cannot be had by his personal representative."

Accordingly, then, it is well settled in West Virginia that any contributory negligence on the part of the decedent, however slight, would bar his personal representative from recovering under West Virginia's Wrongful Death Act. See also the cases cited in footnote 15.

In *Curtis* v. *A. Garcia Y Cia*, 241 F. 2d 30 (3d Cir. 1957), the Court of Appeals for Third Circuit held that where a suit for wrongful death was instituted in admiralty based upon the Pennsylvania Wrongful Death Act, the Pennsylvania rule on contributory negligence governed and accordingly any contributory negligence on the part of the decedent barred recovery.

In the Sixth Circuit case of *Niepert* v. *Cleveland Electric Illuminating Company*, 241 F. 2d 916 (6th Cir. 1957) cert. den., 354 U.S. 909, 77 S. Ct. 1295, 1 L. Ed. 2d 1427 (1957), the Court held that the Ohio rule of contributory negligence "having become part of the Ohio substantive law with reference to wrongful death" governed in a case of a wrongful death action instituted in admiralty based upon the Ohio Wrongful Death Act.

In the Fifth Circuit case of *Hartford Accident & Indemnity Co.* v. *Gulf Refining Co.*, 230 F. 2d 346 (5th Cir. 1956), cert. den., 352 U. S. 832, 77 S. Ct. 49, 1 L. Ed. 2d 52 (1956), the Court held in actions brought in admiralty under Louisiana death statute, for deaths of barge company's employees in explosion, that the actions were subject to all defenses against such claims, including contributory negligence, available to a defendant in a suit at law.

In the Sixth Circuit case of *Feige* v. *Hurley*, 89 F. 2d 575 (6th Cir. 1937), the Court held that right of action in personam for death under Kentucky's wrongful death statutes is enforceable in admiralty according to principles of the common law of Kentucky, under which contributory negligence is complete bar to recovery.

See also the cases of *Klingseisen* v. *Costanzo Transp. Co.*, 101 F. 2d 902 (3d Cir. 1939), and *Byrd* v. *Napoleon Avenue Ferry Co.*, 125 F. Supp. 573 (E. D. La., 1954), affirmed in a memorandum decision, 227 F. 2d 958 (5th Cir. 1955), cert. den., 351 U. S. 925, 76 S. Ct. 783, 100 L. Ed. 1455 (1956).

Even in the recent case of *Holley* v. *The Manfred Stansfield*, 269 F. 2d 317 (4th Cir. 1959), the Court recognized that it was necessary to look to the State law as to the defenses available to the defendant in an admiralty suit based on the Virginia Wrongful Death Act. The Virginia Act, unlike most wrongful death acts, specifically covers, among other things, " 'wrongful acts or defaults of any ship or vessel' " and speaks of the right " 'to proceed *in rem* against the ship or vessel.' " There is no similar language in the West Virginia Act.

Returning to the defenses of assumption of risk and contributory negligence under West Virginia law, it has been made clear by the West Virginia decisions that the two defenses are not identical. In the recent case of *Matthews* v. *Gas Co.*, 138 W. Va. 639, 656, 77 S. E. 2d 180 (1953), the West Virginia Supreme Court of Appeals, quoting in part from the earlier case of *Wright* v. *Valan*, 130 W. Va. 466, 43 S. E. 2d 364 (1947), said:

> " '. . . The essence of contributory negligence is carelessness; of assumption of risk, venturiousness.' . . . Contributory negligence rests in tort; assumption of risk rests in contract or in the principle expressed by the maxim 'volenti non fit injuria' which, translated is that 'he who consents cannot receive an injury.' . . . Contributory negli-

gence implies the failure to exercise due care; assumption of risk involves a choice made more or less deliberately and negatives liability even though the plaintiff may have acted with due care. The doctrine of assumption of risk is not limited to the relation of master and servant or to other contractual relations with respect to situations in which a person voluntarily assumes what is sometimes characterized as an incurred risk incident to a known and appreciated danger...

"The doctrine of assumed or incurred risk is based upon the existence of a factual situation in which the act of the defendant alone creates the danger and causes the injury, and the plaintiff voluntarily exposes himself to the danger with full knowledge and appreciation of its existence. ... The doctrine has been stated in these words: 'A person, who brings about a condition or situation obviously dangerous to himself by voluntarily exposing himself to a hazard created by another, assumes the risk of injury so created and thereby relieves such other of legal responsibility for an injury resulting from such exposures.'"

The District Judge in his conclusions of law in this case said:

"As to the doctrine of assumption of risk, I conclude that under the circumstances of this case Goett did not assume the risk of the danger which caused his death. I think it is not necessary to decide whether he did or did not assume the risk of falling over the side of the boat. It was not the fall that caused his death. The cause of his death, as I have found in my findings of fact, was the failure of Union Carbide and Carbon Corporation to have available rescue equipment, and that is a risk which I conclude Goett did not assume." (R. 196, 197)

Respondent Carbide submits that the findings of the District Judge that decedent did not assume risk of purported danger from lack of safety and rescue equipment is clearly erroneous. Assumption of risk on the part of the decedent is obvious. See *Ross* v. *Steamship Zeeland*; 240 F. 2d 820 (4th Cir. 1957), discussed *infra*.

If there was duty on the part of Carbide to furnish safety and rescue equipment, and that it denies, then it is obvious that the deceased assumed the risk of any danger to his own safety and welfare which may have been present by reason of the absence of such equipment.

The decedent's death occurred on the afternoon of the second day that he had worked on this particular barge, the CC-204, owned by Carbide. (R. 51) While of course, we do not have the testimony of the decedent, it is evident that in that time he recognized, or should have recognized, the very obvious fact that there was no safety or rescue equipment on the deck of the barge. A fellow employee testified as follows (R 51.):

> "Q. You well knew the location of the barge and you knew what was on the barge and what was not on the barge for some time before Mr. Goett fell overboard, didn't you?
> "A. Yes, sir.
>
> "Q. You were entirely familiar, weren't you, with the barge and its design and its location?
> "A. Yes, sir."

In *Humphreys* v. *Newport News & M. V. Co.*, 33 W. Va. 135, 10 S. E. 39 (1889), it was said: "If a servant willfully encounters dangers which are known to him, or are notorious, the master is not responsible for injury occasioned thereby," or, as put by the West Virginia Court in the recent decision of *Matthews* v. *Cum-*

berland & Allegheny Gas Co., supra, "A person who brings about a condition or situation obviously dangerous to himself by voluntarily exposing himself to a hazard created by another, assumes the risk of injury so created and thereby relieves such other of legal responsibility for an injury resulting from such exposures," and as shown by the cases cited above, it is the West Virginia law that should be applied here with regard to assumption of risk and contributory negligence.

With respect to contributory negligence on the part of the decedent, the District Judge in his conclusions of law in this case said:

> "On the question of contributory negligence my conclusion is that Mr. Goett was not guilty of any negligence that contributed to his death. I, in explanation of that, conclude that it is the burden of the one alleging contributory negligence to prove that contributory negligence by a preponderance of the evidence."

The superintendent of maintenance for Amherst, Mr. Frederick P. Martin (R. 74, 75), testified with respect to the availability of life jackets to the decedent and his fellow employees, as follows:

> "Q. Mr. Martin, at the time of Mr. Goett's death did the Amherst Barge Company require men working on the barges to wear life jackets?
> A. It wasn't required, but we did stress safety in a man, if he was afraid, that he had those for his benefit. In other words, they were furnished.
>
> Q. State whether or not life jackets were available for anyone who wanted to use one.
> A. The life jackets were always available.

Q. Where were they available?
A. We had them on our steamboats, plus a sufficient number in the supply house, more than what employees we employed there in the operation.

Q. Do you know approximately how many were available in the supply house?
A. I would say in the neighborhood of ninety.

Q. State whether or not the supply house was kept open.
A. At all hours during the work time, yes, sir.

Q. Did the men have occasion to go there?
A. Several times a day.

Q. Do you know whether Mr. Goett had occassion to go there on the day of his accident?
A. Mr. Goett was there the morning of this accident because I was talking to him that morning.

Q. What would a man, an employee who worked on these barges, such as Mr. Goett, have to do in order to get a life jacket if he wanted one?
A. Ask is all.

Q. Where did he have to ask?
A. The Supply department. They also have equipment. I may add that. In other words, any tool, any equipment (fol. 423) they wanted they could always get any type of material that way they wanted." (R. 140, 141)

The facts here are similar to those in *Ross* v. *The Zeeland* supra, in which both the Court of Appeals for the Fourth Circuit and the District Court, 143 F. Supp. 656 (E. D. Va. 1956) held that "the contributory negligence on the part of libellant is obvious," and the lower Court further said, "His carelessness in the face of

known facts would seem to obviate the necessity of further discussion on this point.

In the *Ross* case, the libellant, a watchman, employed by an independent contractor, was directed late at night by the Chief Officer to enter the No. 1 hold of the vessel to search for lighted cigarettes and persons. The hold was dark and no flashlight was provided or requested. The libellant in the daylight hours and in the night when light was available had entered the No. 1 hold a number of times. On these occasions he had observed a pile of wire cable about four feet in height located in the vicinity of the forward ladder. On descending this ladder, late at night, in the dark, and without a flashlight, he tripped over the pile of wire and thereby was injured. Upon these facts, the District Court and the Court of Appeals held that "contributory negligence on the part of the libellant is obvious," and that conclusion apparently rested upon the fact that the libellant had not requested or obtained a flashlight.

Here decedent had not requested or obtained any safety equipment for his own protection.

The defense of contributory negligence is not pertinent, however, until primary negligence on the part of Carbide has been shown, and we do not believe that such has been shown in this case. Plaintiff must establish primary negligence before question of contributory negligence arises, and before there can be primary negligence some duty owing from the defendant to the plaintiff must have been violated.

In this connection it should be remembered that no primary negligence was shown, and if it is to be as-

sumed, that no attempt was made by the District Judge to apply the doctrine of comparative negligence.

D. Assuming that Ellen Goett, personal representative of the decedent, would be permitted to recover damages from Carbide for the death of Marvin Paul Goett, the maximum permissible recovery under the West Virginia Wrongful Death act is twenty thousand dollars.[16]

In *The Tungus* v. *Skovgaard*, supra this Court said:

> "... The decisions of this Court long ago established that when admiralty adopts a State's right for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached... That is the doctrine which has been reiterated by the Court through the years.
>
> "... The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable but that damages shall be recoverable when conduct of a particular kind results in death. *It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose.*" (Italics supplied.)

This is also a well-settled principle in Conflict of Laws, which principles are applicable in admiralty cases based on a state's wrongful death act according to *Levinson* v. *Deupree*, 345 U. S. 648, 73 S. Ct. 914,

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[16]Chapter 55, Article 7, Section 6, of the Official Code of West Virginia, 1931, as amended; Dunsmore v. Hartman, 140 W. Va. 357, 84 S. E. 2d 137 (1954).

97 L. Ed. 1319 (1953). In *Hupp Motor Car Corp.* v. *Wadsworth*, 113 F. 2d 827, 829 (6th Cir. 1940), the Court said:

> ". . . The measure of damages in an action for tort is determined by the law of the state where the tort was committed."

See also *Barnes* v. *Union Pac. R. R. Co.*, 139 F. Supp. 198 (D. Idaho, 1956), and 11 Am. Jur., Conflict of Laws, § 185.

The West Virginia Wrongful Death Act expressly limits the damages recoverable in such action:

> ". . . the jury may give such damages . . . not exceeding twenty thousand dollars as the total of all damages recoverable in such action." Code Serial Section 5475 (6).

In *Dunsmore* v. *Hartman*, 140 W. Va. 357, 361, 84 S. E. 2d 137 (1954), the Court said:

> "The plain language of the statute (referring to the West Virginia Wrongful Death Act), we think, limits the jurisdiction of the court in an action for recovery of damages for wrongful death, both as to the nature of the damages recoverable and as to the maximum amount of recovery."

Thus, irrespective of the extent of recovery which may have been permitted "if death had not ensued," recovery for wrongful death in West Virginia is expressly limited to twenty thousand dollars.

The cases of *Workman* v. *New York*, 179 U. S. 552, and *The Thielbek*, 241 F. 209, cited at pages 45 and

46 of the petitioner's brief, are distinguishable as they do not involve a cause of action arising under a state's wrongful death act.

E. Damages under the West Virginia Wrongful Act may be assessed only by a jury.[17]

As has been noted previously, the recent case of *The Tungus* v. *Skovgaard*, *supra*, reiterates the principle long ago well established that admiralty must enforce a state's wrongful death act "with whatever conditions and limitations the creating State has attached . . . It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose."

The West Virginia Wrongful Act provides that ". . . the jury may give such damages . . ." as authorized. In *Legg* v. *Jones*, 126 W. Va. 757, 30 S. E. 2d 76 (1944), the court said, "In actions (for wrongful death), it is the peculiar right, as well as the duty, of the jury to fix the amount of the recovery. The right is conferred and the duty imposed by the statute which gives the right of action . . . The authority of the jury to determine the amount of recovery in such cases is absolute."

Moreover, Art. III, Sec. 13 of the West Virginia Constitution provides that "In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; . . ." This constitutional right given to all litigants

[17]Chapter 55, Article 7, Section 6, of the Official Code of West Virginia, 1931, as amended; Legg v. Jones, 126 W. Va. 757, 30 S. E. 2d 76 (1944); see also 15 C. J. S. Conflict of Laws, § 4, p. 858.

in common law suits was made a part of the cause of action provided by the West Virginia legislature for wrongful death.

While the case was originally brought on the law side of the docket and at least two pre-trial conferences were had, no order was entered on such pre-trial conferences. However, the Court announced some two weeks prior to the trial that it would sustain a motion of the plaintiff to transfer the case into admiralty. This motion was opposed by the defendant because it was inconsistent with the former positions taken by the plaintiff and because it deprived the defendant of the right to a jury trial, to which the defendant is entitled under the wrongful death act of West Virginia (Code 55-7-5, 6). On this state of the record and without an order defining the issues, the case came on for trial on May 13, 1957, before a judge sitting without a jury in admiralty.

The respondent Carbide submits that the District Court committed error in proceeding to determine the amount of recovery under the West Virginia Wrongful Death Act, without a jury.

A jury trial is not foreign to admiralty. The Great Lakes Act, 5 Stat. 726, 28 U. S. C. A. § 1873, provides for a jury trial, as follows:

> "In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters concerning said

lakes, the trial of all issues of fact shall be by jury if either party demands it."

See reference to this subject in *Romero* v. *International Term. Operat. Co.*, 358 U. S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368, 381 (1959).

Since admiralty is required to provide a jury trial in all suits brought under The Great Lakes Act, why likewise it is not required to provide a jury trial for suits under the West Virginia Wrongful Death Act where assessment of damages by a jury is mandatory. The two Acts are indistinguishable in this respect, and the Legislature of the State of West Virginia has under the Constitution of that state the undoubted right and power to so provide.

F. A breach of the warranty of seaworthiness, a maritime principle, resulting in death does not give rise to a cause of action under the West Virginia Wrongful Death Act.[18]

The West Virginia Wrongful Death Act provides a cause of action for the death of a person when death is "caused by wrongful act, neglect, or default." It has never been decided by the West Virginia Supreme Court of appeals or by any other court whether a breach of the warranty of seaworthiness, a maritime principle, constitutes a "wrongful act, neglect, or default" under the West Virginia Act. It was not decided by the District Court or by the Court of Appeals in this case, the Court of Appeals taking the position that it was not necessary to decide the issue "because Goett was not a person to whom the warranty of seaworthi-

[18]Chapter 55, Article 7, Section 6, of the Official Code of West Virginia, 1931, as amended.

ness ran, and because we do not agree with the finding of the district judge that the barge was unseaworthy."

Accordingly, before this Court may decide that the warranty extended to the decedent and that it was breached, it must decide for the first time that a breach of the warranty of seaworthiness constitutes a "wrongful act, neglect, or default" under the West Virginia Wrongful Death Act. Thus, *The Tungus* v. *Skovgaard*, supra. ("We cannot say its (Court of Appeals) conclusion is clearly wrong"), and *United N. Y. & N. J. S. H. Pilots Asso.* v. *Halecki*, supra, ("But even if the Wrongful Death Act of New Jersey be interpreted as importing the federal maritime laws of unseaworthiness, . . ."), are to be distinguished. The issue here should not be decided for the first time by this Court, but the West Virginia Wrongful Death Act's construction in this particular (if the court reaches this question) "should be sought under readily available state procedure; from the state court, while the case is held in the federal court." See Mr. Justice Frankfurther's concurring opinion in *Skovgaard*.

VII.

The Court of Appeals and the District Court were correct in holding that the warranty of seaworthiness does not extend to the decedent, a shorebound employee of an independent contractor engaged in sandblasting a non-self-propelled and unmanned barge which had been withdrawn from navigation and delivered into the sole custody and control of Amherst, the independent contractor, for repairs requiring drydocking.[19]

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[19]United N. Y. & N. J. S. H. Pilots Asso. v. Halecki, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541, 544 (1959); Desper v. Starved

In his conclusions of law, the District Judge found that this case was not one "for the applicability of the doctrine of liability without fault." (R. p. 196)

While the Court of Appeals discussed at some length the warranty of seaworthiness and its application to the decedent, only the most pertinent part of that discussion will here be quoted:

> ". . . Goett was not a person to whom the warranty of seaworthiness ran . . .
>
> * * * *
>
> ". . . In the instant case . . . , the barge had been temporarily withdrawn from navigation and delivered into the sole custody and control of Amherst, the dry-dock company. While in extent the work was not as great as in Berryhill (*Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (9th Cir. 1956), cert. den. 354 U. S. 938, 77 S. Ct. 1400, 1 L. Ed. 2d 1537 (1957)), Berge (*Berge* v. *National Bulk Carriers*, 251 F. 2d 717 (2d Cir. (1958)) and Raidy (*Raidy* v. *United States*, 252 F. 2d 117 (1958)), in character it was the same, because it could not be done by the regular crew, but required that the vessel be withdrawn from navigation and turned over to

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Rock Ferry Co., 342 U. S. 187, 72 S. Ct. 216, 96 L. Ed. 205 (1952); Pope & Talbott v. Hawn, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); Seas Shipping v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946); West v. United States, 256 F. 2d 671 (1958), cert. granted, 359 U. S. 924 (1959); Raidy v. United States, 252 F. 2d 117 (1958); Berge v. National Bulk Carriers, 251 F. 2d 717 (2d Cir. 1958); Berryhill v. Pacific Far East Line, 238 F. 2d 385 (9th Cir. 1956), cert. den., 354 U. S. 938, 77 S. Ct. 1400, 1 L. Ed. 2d 1537 (1957); Mitchell v. Trawler Racer, Inc., 265 F. 2d 426 (1st Cir. 1959); Lundberg v. Prudential Steamship Corp., 102 F. Supp. 115 (S. D. N. Y., 1951); see generally annotation entitled "Who are 'seamen' within the meaning of the Jones Act—federal cases," 96 L. Ed. 211.

> a drydock company having special facilities and equipment for the work. The work order called for drydocking of the vessel; without such drydocking the bottom and sides of the barge would have been inaccessible. The warranty of seaworthiness does not apply in that situation."

The respondent Carbide submits that the District Court and the Court of Appeals were correct in holding that the warranty of seaworthiness did not extend to the decedent.

Reference will be made again to the contract between Carbide and Amherst, the pertinent aspects of which are contained in the Court of Appeals statement of facts, which is largely undisputed by the petitioner. (See Petitioner's Brief, pp. 4 and 5.)

> "... In October, 1955 Carbide contracted with Amherst for a biennial drydocking, certain welding, repairs and improvements to the barge, including installation of twenty-four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides, with preparation for the painting by means of sandblasting. The work was to be done in according with Garbide's written specifications. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications."

At the outset one thing is to be emphasized, that is, this barge did not have a crew, it was unmanned; thus the work of the decedent could not have been that traditionally performed by seamen within the meaning of *Sieracki* and *Hawn* (see footnote 19 of this brief)

because no seaman had ever been assigned to this barge. In the *Sieracki* case, this Court extended the warranty of seaworthiness to stevedores, in the words of Mr. Justice Burton in his dissenting opinion to *Peterson* v. *Alaska Steamship Co.*, 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954), ". . . largely on the premise that the stevedores were then rendering services usually and formerly performed by the crew."

The justification for the rigid standard of the doctrine of seaworthiness was said in *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561, to be as follows:

> ". . . We have often had occasion to emphasize the conditions of the seaman's employment . . . which have been deemed to make him a ward of the admiralty and to place large responsibility for his safety on the owner. He (the seaman) is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest working conditions and appliances as commanded by his superior officers."

What "rigorous discipline of the sea" was the decedent subjected to? What "conditions of his service constrain(ed) him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers." To answer the first and to paraphrase Judge Lumbard in his dissent to *Halecki* in the Second Circuit (251 F. 2d 708, 715), the decedent risked all such hazards and was subject to such "vigorous discipline of the sea" as a shorebound employee might experience them on a calm clear afternoon in early October on a flat surface of a barge

(R. 35) moored securely to the shore and floating on the calm Kanawha River. Surely, the decedent in operating a sandblasting machine on the flat deck of the barge CC-204 was subjected to less danger than a repairman employed to repair a leaking roof of an average house.

In determining who is a "seaman" within the Jones Act, it has been frequently decided that a person is not a seaman, although he works aboard a ship, if the ship is not in navigation. Annotation, 96 L. Ed. 217. The status of the vessel has been an important factor in determining who is a seaman (see *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 72 S. Ct. 216, 96 L. Ed. 205 (1952)), even when a shorebound employee is performing seamen's work. Such was an important consideration in the decision by the Court of Appeals in this case that the warranty of seaworthiness did not extend to the decedent.

In *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (9th Cir. 1956), cert. den., 354 U. S. 938, 77 S. Ct. 1400, 1 L. Ed. 2d 1537 (1957); the status of the vessel played an important part in that court's decision that the warranty did not extend to a shoreside machinist injured aboard a vessel while dry-docked for repairs. In the *Berryhill* case, the court made the following observations which are here pertinent:

> "Here the repairs had nothing to do with loading or unloading the ship. * * * Not all repairs are 'ship's work' to be performed, historically or currently, by the crew.
>
> "The Supreme Court (in the *Hawn* case footnote 19 of this brief) refers to the repairs Hawn

was making to the loading equipment as 'slight'. The purpose of his repairing was to permit the loading 'to go on at once.' This would indicate a doubt in the Court's mind if any very general repairs to a ship could, or should be included as 'ship's work.' In the instant case, the repairs were nothing of an improvised, hurried nature, done to save the 'ship work' time, but were of sufficient importance to cause the ship to be dry-docked." (In the instant case, the barge was not in fact dry-docked until the day following the decedent's death; that was within the discretion of Amherst.)

* * * *

"The appellant has his statutory remedy against his employer. Longshoremen's and Harbor Workers' Compensation act, 33 U. S. C. A. §901 et seq. He has his common law remedy as a business invitee against the shipowner, if he can prove the latter's negligence. In view of such rights and protection, he does not need, nor should he ask, for the further extension of a doctrine already stretched. If there exists a social need for such an extension (which we doubt in view of existing remedies), it is a matter for Congressional enactment, and not for this Court to bring about thru judicial legislation."

In *United N. Y. & N. J. S. H. Pilots Asso.* v. *Halecki*, supra, discussed infra, this Court noted in refusing to extend the warranty to Halecki, that the work which he was doing was not "connected with a ship's seagoing operations."

In *West* v. *United States*, 256 F. 2d 671, 673 (3d Cir. 1958), cert. granted, 359 U. S. 924, the Third Circuit held that the warranty did not extend to shore-

bound engineer employed on a merchant ship being reconditioned for navigation. The Court reasoned, in part, as follows:

> "It may be possible to say, as the Supreme Court has, that a stevedore loading or unloading a ship (Sieracki, supra), or a carpenter repairing grainloading equipment on a ship in active navigation (Pope & Talbot, Inc., v. Hawn, 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143), are performing work of a maritime nature. But this libelant was a shoreside engineer who came on board to work on the rehabilitation job preparatory to getting the ship back into service. That is not something which bears any resemblance to marine navigation."

Carbide's barge, the CC-204, had likewise been withdrawn from navigation at the time of decedent's employment thereon. It was, as has been shown, in biennial drydock for substantial renovation and repairs, part of which involved sandblasting preparatory to painting. The status of the barge at the time with which we are here concerned precluded the extension of the warranty to the decedent.

Yet for another reason the warranty did not extend to Goett, that is, he was not performing a work usually performed by the crew. In the recent *Halecki* case, *supra*, this Court, in reversing the Court of Appeals for the Second Circuit, held that the warranty of seaworthiness did not extend to Halecki, a shorebound employee of an independent contractor, who was on board a ship to clean its generators with carbon tetrachloride. This Court reasoned as follows:

> "Neither these decisions nor the policy that underlies them can justify extension of liability

for unseaworthiness to the decedent in the present case. The work that he did was in no way the type of work traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was dead with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and special equipment—portable blowers, air hoes, gas masks and tanks of carbon tetrachloride, all brought aboard the vessel for this special purpose, and none connected with a ship's seagoing operations.

* * * *

"It avails nothing to say that the decedent was an electrician, and that many modern ships carry electricians in their crew. Pope & Talbot, Inc. v. Hawn explicitly teaches that such labels in this domain are meaningless. See 346 US at 413. It is scarcely more helpful to indulge in the euphemism that the decedent was cleaning part of the ship, and to say that it was a traditional duty of seamen to keep their ship clean. The basic fact is, in the apt words of Judge Lumbard's dissenting opinion in the Court of Appeals, that the decedent was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed. 251 F2d 708, at 715. To extend liability for unseaworthiness to the decedent here would distort the law of Mahnich, of Hawn and of Sieracki beyond recognition. We therefore hold that it was error to instruct the jury that the shipowner could be held liable in this case even if they should find that the shipowner had exercised reasonable care."

So, in the instant case, the decedent in using a sandblasting machine, while wearing a respirator and hood, was using special equipment brought aboard the barge

and not "connected with (the) ship's seagoing operation." The decedent in using this special equipment, was " 'not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed.' " Accordingly, respondent Carbide submits that the District Court and the Court of Appeals were correct in holding that the warranty of seaworthiness did not extend to the decedent.

VIII.

Assuming that the warranty of seaworthiness extended to the decedent, the Court of Appeals was correct in holding that the barge CC-204 was not unseaworthy.[20]

The Court of Appeals not only held that the warranty of seaworthiness did not extend to the decedent, but also held that the "barge was not unseaworthy," reasoning that "(i)n its ordinary operations, it was unmanned, and did not require life saving eqiupment. It did not become unseaworthy when men went aboard after it had been turned over to a repair yard under the circumstances of this case."

By certificate issued April 6, 1955 (R. 217), the United States Coast Guard certificated Carbide's barge, CC-204, as an unmanned tank barge. This barge had no crew and the determination of its status by the Coast Guard should not be subject to collateral attack in the

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[20]Lester v. United States, 234 F. 2d 625 (2d Cir. 1956), cert. granted, 352 U. S. 889, 77 S. Ct. 130, 1 L. Ed. 2d 85; dismissed per stipulation pursuant to Rule 60 of the Rules of this Court, 352 U. S. 983, 77 S. Ct. 384, 1 L. Ed. 2d 366 (1957).

absence of direct allegations of fraud or impropriety which do not exist here.

The *Lester* case, *supra*, presents a factual situation similar to the one in the instant case.

Libellant (Lester) was employed by Marine Basin as an assistant electrician and in the course of his employment boarded a motor yacht owned and operated by the U. S. Army. "To determine whether the vessel's running lights were operative, libellant left the pilot house, took three or four steps on the deck aft the pilot house (known as the 'trunk top'), lost his footing and fell overboard to the floor of the dry dock. * * * Thus, libellant, for some unexplained reason, fell from an unobstructed and virtually level canvas-covered surface across and past the main deck to the floor of the dry dock below."

On an allegation of unseaworthiness, the Court said, "We do not think that the United States was under any obligation to provide the Q-100 with main deck guard railings against the remote possibility that an experienced dry dock worker such as libellant would fall from the trunk top roof some 18 to 24 inches above the main deck. * * * The United States provided libellant with a motionless, unobstructed, and virtually level canvas-covered surface from which libellant, an experienced dry dock worker, could observe whether the running lights were operative. With the exercise of reasonable care, libellant could have performed the task in safety." The Court concluded, "Since we hold the ship was not unseaworthy we do not reach the question of whether the trial court's finding that libellant was not negligent is clearly erroneous."

In the instant case it is not contended that the barge was unseaworthy for navigation. Petitioner's contention is that additional equipment is required when the barge is withdrawn from navigation. We have found no case so holding. The Court of Appeals was clearly right in holding the barge to be seaworthy.

IX.

For any damages the petitioner may recover from Carbide in this case, Carbide is entitled to be indemnified by Amherst under the express terms of contracts between Carbide and Amherst, and by reason of Amherst's breach of its implied contractual duty to do the work contracted for in a safe and workmanlike manner.[21]

After the institution of the instant suit by the petitioner against respondent Carbide, Carbide filed a third-party complaint (R. 5) against Amherst Barge Company alleging that it was entitled to be indemnified by Amherst for any recovery had against it by reason of a breach of Amherst's implied contractual

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[21]Crumady v. Joachim Hendrik Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413 (1959); Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956); Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U. S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491 (1958); Halcyon Lines v. Haenn, 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318 (1952); American President Lines v. Marine Terminals Corp., 234 F. 2d 753, 759 (9th Cir. 1956), cert. den., 352 U. S. 926, 77 S. Ct. 222, 1 L. Ed. 2d 161 (1956); United States v. Rothschild International Stevedoring Co., 183 F. 2d 181 (9th Cir. 1950); American Stevedores v. Porello, 330 U. S. 446, 91 L. Ed. 1011 (1947), and upon remand Porello v. United States, 94 F. Supp. 952 (S. D. N. Y., 1950); Hunt v. Bank Line, 35 F. 2d 136 (4th Cir. 1929); Sunday Creek Coal Co. v. Gray, 238 F. 325 (4th Cir. 1916); 56 C. J. S. Master and Servant, § 205; 35 Am. Jur., Master and Servant, § 188.

duty and by reason of a breach of the express terms of the contract between Carbide and Amherst. Amherst's answer (R. 7) to Carbide's third-party complaint denied any duty or obligation to indemnify Carbide.

With respect to Carbide's claim for indemnification from Amherst, the District Judge held:

> ". . . My conclusion of law is that there is no liability from the third-party defendant to the third-party plaintiff arising out of the judgment herein awarded to plaintiff Ellen Goett Administratrix, etc., against Union Carbide & Carbon Corporation." (R. 237)

The District Judge had earlier found that "(f)ailure to provide rescue equipment was the proximate cause of Goett's death," and that Carbide was negligent in failing to provide this equipment. (R. 194)

The District Judge thus found that the proximate cause of the decedent's death was the failure of Carbide to provide rescue equipment on its barge, and that Amherst was not only not negligent in failing to provide its own employees with available rescue equipment, but also was not negligent in not furnishing the decedent with a life jacket and in not erecting railings or stanchions on the barge. In a word, the District Judge found that there was no duty on the part of Amherst to provide its own employees with a reasonably safe place to work, and at the same time imposed a greater duty upon Carbide towards these employees of an independent contractor than the law provides.

The Court of Appeals did not reach the question of Carbide's right to indemnification from Amherst, for

it decided that there had been no breach of any duty owed by Carbide to the decedent and that the warranty of seaworthiness did not extend to the decedent nor was the barge CC-204 in fact unseaworthy.

Respondent Carbide submits that the findings and conclusions of the District Court that there was no negligence on the part of Amherst towards its own employee, the decedent, are clearly erroneous and should be reversed by this Court if it gets to the question of Carbide's right to indemnification from Amherst.

While, as noted, the Court of Appeals did not reach the question of the right to indemnification, it did consider the duty which Amherst owed to its own employees and we think it stated the law correctly, as follows:

> "... It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It knew and controlled the conditions of the work and the equipment which would be used. It was Amherst's responsibility to decide whether a temporary railing or stanchions should be erected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted. For negligence in any of these respects it would be liable to plaintiff herein for damages, were it not for the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901-905. But Carbide is not liable to plaintiff for negligence, it breached no duty it owed Goett." (In a footnote the Court notes that "(u)nder the terms of that Act (Longshoremen's) Goett's wife and children are now entitled to receive,

without proof of negligence on anyone's part, compensation which may exceed the maximum amount recoverable under the West Virginia Wrongful Death Act.")

In *Porello* v. *United States*, 94 F. Supp. 952 (S. D. N. Y. 1950), after remand of the case from this Court (330 U. S. 446, 91 L. Ed. 1011), Judge Kaufman in quoting from the Court of Appeals opinion before remand (153 F. 2d 607-608) said, "The primary duty to furnish its employees a safe place to work rested on the stevedore. (independent contractor and employer). It was in control of the conditions under which the work was to be done and its foreman knew the bolt was missing and should have foreseen the danger and avoided it."

So, in the instant case, Frederick P. Martin, superintendent of maintenance for Amherst, testified that two days prior to the decedent's death he was on board the CC-204 and noted that there were no stanchion lines or railings around the outer decks of the barge nor life rings or life buoys or similar equipment on board. (R. 138)

Thus, Amherst was aware of the condition of the barge before the decedent was assigned to the sandblasting operation. Being aware of the lack of safety and rescue equipment (the normal condition of the barge), it was incumbent upon Amherst to take such corrective measures to furnish its employees with a reasonably safe place to work. In the Fourth Circuit case of *Sunday Creek Coal Co.* v. *Gray*, 238 F. 325 (4th Cir. 1916), the Court said:

"If the work be of hazardous nature, the master is liable, not for the danger to which the ser-

> vant is necessarily exposed, but for negligence in failing to make reasonable provision for the servant's safety."

In 56 C. J. S., Master and Servant, § 205, it is written:

> "It is actionable negligence on the part of the master to fail to furnish or fail to exercise ordinary or reasonable care to furnish, the servant with such proper tools and appliances that maybe required for the reasonably safe prosecution of the work, and he cannot escape liability for failing to furnish proper safety appliances because they might have not been effectual or might not have been used if at hand."

And in 35 Am. Jur., Master and Servant, § 188, it is said:

> "Liability on the part of the employer for injury incurred by an employee in the course of his employment is predicable of a failure on the employer's part to furnish for the use of the employee injured an instrumentality such as a scaffold, where the employer ought to have anticipated that the calamity would result from the employee's working without the appliance."

It was, therefore, incumbent upon Amherst to supply the decedent and its other employees on the CC-204 "such proper tools and appliances that may be required for the reasonably safe prosecution of the work." Amherst's duty to its own employees was not less than that of Carbide; indeed, as previously pointed out in Point VI-A of this brief, we believe that Amherst had a higher duty to the decedent and his fellow employees than Carbide. The District Judge, on the other hand, found a higher duty on Carbide than on Amherst. To

apply his findings to an anologous situation, a homeowner has a greater duty to furnish the employees of a roofing contractor with safety ladders, ropes, scaffolding, etc., than the independent contractor, the employees' own employer, has. This we submit is clearly error. If Carbide breached a duty it owed to the decedent *a fortiori*, Amherst breached a duty also. If Carbide was guilty of an omission, so likewise was Amherst.

Having shown that Amherst was also negligent towards the decedent, is Amherst required to indemnify Carbide for any recovery which the petitioner may have against Carbide in this case? This District Judge made no finding on this precise question in that it found no negligence on the part of Amherst. And the Court of Appeals, as previously noted, did not reach this question for the reasons already stated.

Halcyon Lines v. *Haenn*, 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318 (1952), established the principle that a shipowner, who has paid a judgment obtained by a contractor's employee for injuries sustained aboard ship while engaged in making repairs, has no right of contribution against the contractor as joint tortfeasor. While the *Halcyon* case precludes Carbide from recovering contribution from Amherst, the employer of the decedent, it does not preclude a recovery based upon a contractual right of indemnity. *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 100 L. Ed. 133 (1956); *American President Lines* v. *Marine Terminals Corp.*, 234 F. 2d 753, (9th Cir. 1956), cert. den., 352 U. S. 926, 77 S. Ct. 222, 1. I. Ed. 2d 161 (1956).

Carbide submits that it is entitled to indemnification from Amherst for any recovery by the petitioner against Carbide in this case by reason of (A) the terms of an express contract between Carbide and Amherst (R. 208), and (B) by reason of Amherst's breach of its implied contractual duty to do the work contracted for in a safe and workmanlike manner. *Crumady* v. *Joachim Hendrick Fisser*, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413 (1959).

(A) The terms of an express contract obligate Amherst to indemnify Carbide.

The purchase order agreement whereby Amherst agreed to provide the labor and furnish the materials for sandblasting, painting, and installing Butterworth hatches on the CC-204 (R. 207) contains two provisions which properly interpreted bind Amherst to indemnify Carbide for any recovery against it in this case. These provisions set forth under the "Terms and Conditions" of the contract (Pl. Ex. 12 R. 208) relate to "INSTALLATION" and "INSURANCE" and read as follows, the matter within parentheses having been inserted for clarity:

> "INSTALLATION: In the event that any articles ordered hereunder require, in connection with the installation thereof, the services of a supervisor, expert, or other employee connected with or employed by Seller (Amherst), and Seller (Amherst) agrees to furnish the same, either with or without charge, such supervisor, expert or other employee in performing such service shall not be deemed to be the agent or employee of Buyer (Carbide), and Seller (Amherst) assumes full responsibility for

his acts and *omissions*, and exclusive liability for any payroll taxes or contributions imposed by any federal or state law dealing with any of the subjects covered by the Federal Social Security Act approved August 14, 1935." (Italics supplied.)

"INSURANCE: If this agreement provides for work to be performed by Seller (Amherst) on property owned or controlled by Buyer (Carbide) or on property of others named herein, Seller (Amherst) shall insure to each of its employees engaged upon the work the compensation provided for by and shall strictly comply with, each and every statute applicable thereto with respect to Workmen's Compensation and/or Employers' Liability and shall procure and maintain, at the cost and expense of the Seller (Amherst,) until final acceptance of the work by the Buyer (Carbide). Public Liability Insurance in a reputable and financially responsible insurance company, property safeguarding the Seller (Amherst) against liability for injuries to persons, including injuries resulting in death, in amounts acceptable to the Buyer (Carbide) and shall furnish to Buyer (Carbide) written certificates from insurance carriers or from appropriate Governmental authorities establishing that said insurance of employees and said Public Liability Insurance have been procured and are being properly maintained, and that the premiums therefor are paid, and specifying the names of the insurers and the respective policy numbers and expiration dates. All such insurance policies shall provide (unless by statute applicable thereto it is otherwise provided) that in the event of cancellation thereof, written notice of such cancellation shall be effective date of such cancellation."

The essence of the first provision, relating to "INSTALLATION," is that Amherst "assumes full responsibility" for any "omissions" on the part of any supervisor, expert or other employee furnished by Amherst in connection with the installation of the articles ordered, namely, the sandblasting and painting of the CC-204. As previously pointed out, Frederick P. Martin, superintendent of maintenance for Amherst, testified that two days prior to the decedent's death he was on board the CC-204 and noted that there were no stanchion lines or railings around the outer decks of the barge nor life rings or life buoys or similar equipment on board. (R. 138) Earlier Mr. Martin had testified that it would be as much his responsibility as anybody's in Amherst's employment to order lifesaving equipment aboard the barge. (R. 77) Amherst having had the duty of furnishing its employees with a reasonably safe place to work and having had at least an equal duty if not a greater one than Carbide to supply the barge with rescue equipment, as have been shown, the *omission* on the part of Mr. Martin, attributable to Amherst, in failing to order rescue equipment aboard the barge, after having noted its absence, is one for which Amherst has assumed "full responsibility" under its contract with Carbide. See *Porello* v. *United States*, 94 F. Supp. 952 (S. D. N. Y. 1950), wherein Judge Kaufman in quoting from the Court of Appeals before remand (153 F. 2d at p. p. 607-608) said with respect to a somewhat similar provision in a contract between vessel owner and libelant's employer:

> " 'The primary duty to furnish its employees a safe place to work rested on the stevedore. It was in control of the conditions under which the work was to be done and its foreman knew the

> bolt was missing and should have foreseen the danger and avoided it. Although the stevedore's default in that respect might not relieve the shipowner from liability to the injured workman, it would make it reasonable for the shipowner to insist that the stevedore alone bear the loss, and the quoted provision was inserted in the contract for that purpose'."

In conclusion, the omission on the part of Amherst in failing to place rescue equipment on the barge is the source of this suit against Carbide, and under Amherst's agreement to assume "full responsibility" for the default, Carbide is entitled to be indemnified for any recovery had herein.

The second provision of the purchase order agreement upon which Carbide relies for right of idemnity from Amherst is the provision relating to "INSURANCE," quoted above. The gist of this clause is that Amherst agreed to insure its employees, including decedent, with Workman's Compensation and/or Employer's Liability insurance. While this provision does not contain an express hold harmless clause, it, having been inserted into Carbide's form contract, was obviously intended for Carbide's benefit; there would be no reason to incorporate it into the agreement for Amherst's sole benefit. We think the reasoning of Judge Kaufman in *Porello v. United States*, supra, quoted earlier, applies with equal force in ascertaining the meaning and intent of the instant provision, that is, that while the default of Amherst may not relieve Carbide from liability, it would make it reasonable for Carbide to insist that Amherst alone bear the loss, and the provision here being discussed was inserted in the contract for that purpose. This is not to argue that

Carbide attempted to or could contract away liability for its own negligence, if any. But we think Carbide could and did in this instance require its contractor, Amherst, to provide insurance coverage to protect it against direct or indirect claims, and that under this provision Carbide is entitled to indemnification for any damage which may be awarded against it in this proceeding.

B. Carbide is entitled to indemnity against Amherst for any recovery had in this case by reason of Amherst's breach of implied contractual duty to do the work contracted for in a safe and workmanlike manner.

Aside from Amherst's express contractual obligation to indemnify Carbide, Carbide is also entitled to be indemnified by Amherst for any recovery had herein by reason of a breach of an implied contractual duty to carry on the sandblasting operation on the CC-204 properly, safely, and in a workmanlike manner. Competency and safety in the performance of its contract were inescapable elements of the service undertaken by Amherst. *Ryan Stevedoring Co.* v. *Pan-Atlantic SS. Corp.* supra; *Weyerhaeuser S. S. Co.* v. *Nacirema Operation Co.*, 355 U. S. 563, 79 S. Ct. 438, 2 L. Ed. 491 (1958); *American President Lines* v. *Marine Terminals Corp.* supra.

In the *American President Lines* case, a longshoreman, employed by Marine Terminals Corporation, had recovered a judgment for personal injuries against the American President Lines, Ltd., the owner of the steamship President Polk, on which the longshoreman was performing stevedoring services when injured. The

injuries were caused by a defective strongback which fell and hit the longshoreman.

The contract between American and Marine for the stevedoring services contained no express provisions for indemnity. American brought an action against Marine for indemnity, basing the same among others upon Marine's breach of its implied contractual duty to do its work in a safe and workmanlike manner, that is, under the *Ryan* doctrine.

The Court of Appeals allowed indemnification based upon Marine's breach of its implied contractual duty, mainly on the ground that Marine, the independent contractor, had knowledge of the defective beam, yet permitted its employees to work in the face of the danger without taking any precaution for his safety.

The Court in its opinion said:

> "We are not concerned here with a situation in which the stevedore's breach of duty brings about the injuries by operation upon a prior condition caused by the shipowner's negligence which is unknown to the stevedore. Here the stevedore was fully informed of the fact and of the possible consequences of the shipowner's negligence or of the ship's unseaworthiness, and in face of all that proceeded to breach its duty so as to make that negligence an immediately dangerous force. It is true that here, unlike Ryan (referring to the *Ryan* case), there was an act of unseaworthiness or negligence by the shipowner prior to the conduct of Marine, and that the shipowner's negligence consisted of failing to supply a proper device, rather than a failure to discover and correct the breach of duty as in the *Ryan* case. But this is no ground of distinc-

tion, for in the case at bar, as in Ryan, it was the stevedore's breach of duty that created the danger and made it an active condition with immediately foreseeable consequences of personal injury."

In the instant case, Amherst was also fully informed of the fact that there was no safety or lifesaving equipment on the barge before it sent its employees onto the barge to commence the work it contracted to do (R. 138, 77). It therefore breached its implied contractual duty to perform the work it contracted to do for Carbide safely and in a workmanlike manner through its failure to provide its employee, the decedent, with any safety device, e. g., a life jacket, and/or rescue equipment. Consequently, under the *Ryan* and *American President Lines* cases, Amherst should indemnify Carbide for any recovery allowed in this proceeding against the latter.

The very recent case of this Court, *Crumady* v. *Joachim Hendrik Fisser*, supra, emasculates any distinction between the instant case and *Ryan* and *Weyerhaeuser* on the grounds that therein the contractor-employer created the dangerous condition and that its fault preceded that of the shipowner in point of time. *Crumady* also strikes down any supposed *rationale* of these cases which states that a promise of indemnity will be allowed only where the owner is without any actual fault of his own. In *Crumady*, the vessel owner in setting a circuit breaker on a winch at twice the safe working load of the rigging rendered the vessel unseaworthy and this preceded in point of time the negligent act of the contractor in disregarding the safe load limits of the rigging; nevertheless, this Court found that the

negligence of the stevedores (the independent contractor), which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, and the vessel was allowed to recover over against the contractor.

So, in this case, Amherst brought into play the unseaworthiness, if any, of the CC-204, and the negligence, if any, of Carbide by assigning its employees and in particular the decedent to sandblast the CC-204 without placing on the barge rescue equipment and other safety devices, which it knew were not on the vessel (R. 138). For its failure in this regard, it did not perform its contract with Carbide with competency and reasonable safety; accordingly, under the foregoing cases, Carbide is entitled to be indemnified by Amherst for any recovery herein by reason of Amherst's breach of its implied contractual duty to do the work contracted for in a safe and workmanlike manner.

As a final note, it should be pointed out that the Longshoremen's and Harbor Workers' Compensation Act allows but one recovery: compensation under the Act or a recovery from a third person. The plaintiff below cannot have both. As was stated by Judge Parker in *Hunt* v. *Bank Line*, 35 F. 2d 136 (4th Cir. 1929).

> "If he desires to assert his cause of action against a third person, he may do this without forfeiting his right to compensation, provided he gives the notice and files proceedings as the statute provides. In the latter case he must make his election and notify the commission before receiving compensation under the act, and, having done so, he will not receive compensation until

> the action against the third person is tried and determined, and then will receive only the amount of the difference between the recovery against the third person and the compensation which the act provides. He can elect which course he will follow, *but he cannot follow both.*" (Emphasis supplied.)

This is true of course because the Act (33 U. S. C. A. 933 (a)) provides, inter alia, "* * * he may elect * * * to receive such compensation *or* to recover damages against such third person." (Emphasis Supplied.)

As indicated by Judge Parker, the plaintiff cannot lose. The question is, "Who should pay?"

CONCLUSION

Carbide therefore respectfully urges:

1. That the judgment of the Court of Appeals should be affirmed because no negligence has been shown against it.

2. That plaintiff's right, if any, is predicated upon the West Virginia Wrongful Death Statute, which must be taken *cum onere*, and would preclude recovery herein by reason of the contributory negligence or assumption of risk by plaintiff's decedent and in any event the failure of the District Court to assess damages as required by the West Virginia Statute would require review if Carbide is found liable.

3. That if recovery is permitted against Carbide, it is obviously limited to $20,000.00, the maximum allowed by the West Virginia Wrongful Death Act.

4. That Carbide is entitled to full indemnification from Amherst for any recovery permitted against Carbide in this proceeding.

Respectfully submitted,

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Charleston, W. Va.
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